Feb 7. Set
Feb 16 - Postponed a week on account with 204
Apl 13 - Postponed
Reversed Nov 9

Brief of Marshall Stark Wade says Corbin

SUPREME COURT OF THE UNITED STATES.

No. ~~886~~. 221/133.

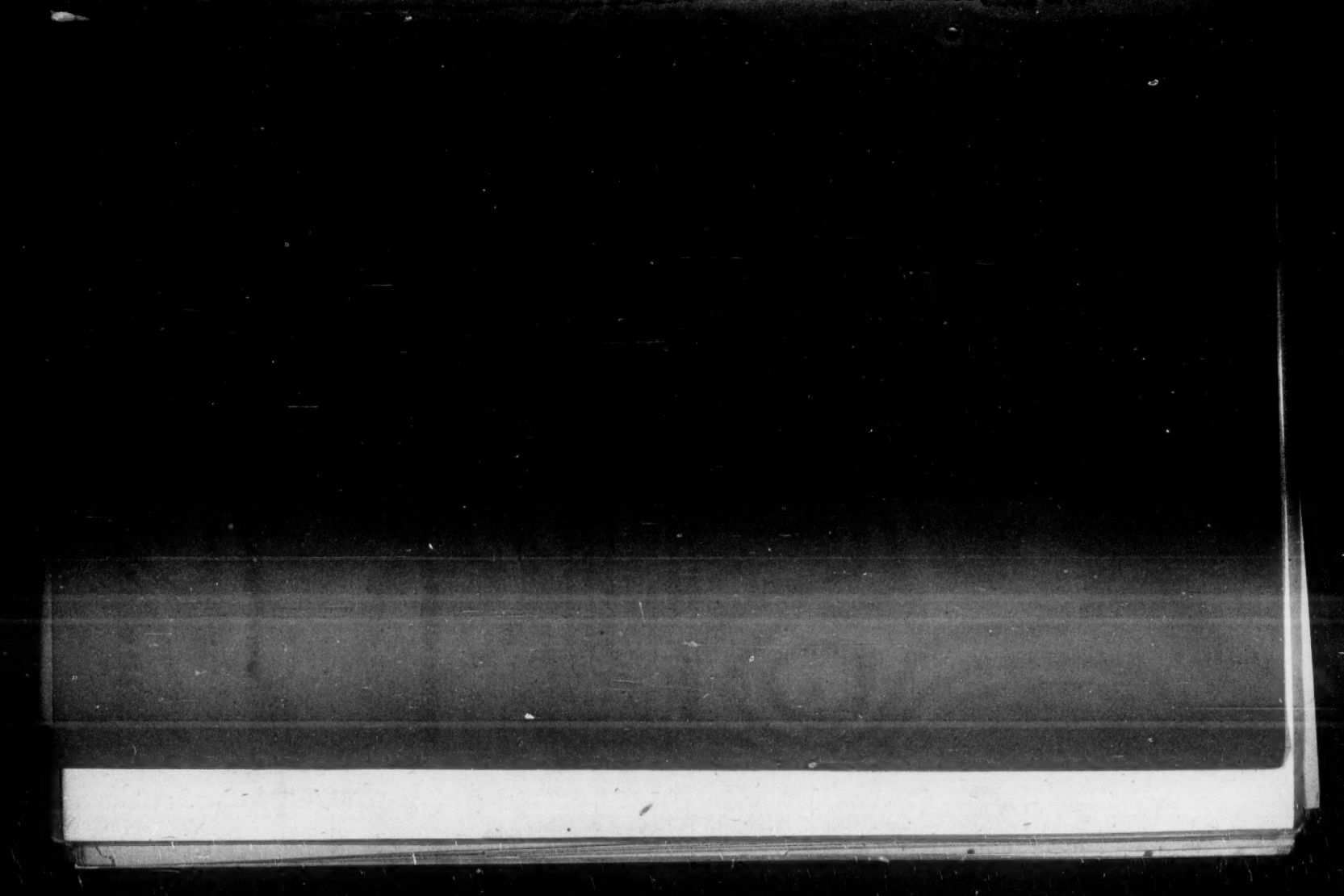
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CALVIN BURR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE



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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Declaration	3	2
Judgment	10	4
Bill of exceptions	13	4
Bond	110	32
Citation and service	112	33

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Calvin Burr, plaintiff, and the Des Moines Navigation and Railroad Company, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said, and as appears by their complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Samuel Nelson, a justice of the Supreme Court of the United States, this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the southern district of New York, in the Second Circuit.

TRACY & OLMSTEAD,
Attorneys for the said Company, New York.

2 UNITED STATES OF AMERICA,
Southern district of New York, ss:

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the following folios, from 1 to 202, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Calvin Burr *vs.* the Des Moines Navigation and Railroad Company, as the same remain of record and on file in said office.

In testimony whereof, I have hereunto caused the seal of the said court to be affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

Filed Nov. 24, 1861.

3 United States circuit court, southern district of New York.

Pleas before the justices of the United States circuit court for the southern district of New York, at the City Hall, of the city of New York, in said district, of the first day of November, in the year of our Lord one thousand eight hundred and sixty-four.

Present: Hon. Wm. D. Shipman, justice; Kenneth G. White, esq., clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that on the first day of November, in the year of our Lord one thousand eight hundred and sixty-four, before the justices of the United States circuit court for said southern district of New York, at the City Hall, in the city of New York, comes Calvin Burr, by Jasper W. Gilbert, his attorney, and brings into the said court, before the aforesaid justices thereof, now here, his certain declaration against the Des Moines Navigation and Railroad Company, being in custody, &c., of a plea of breach of covenant, which said declaration follows in these words, that is to say:

4 In the circuit court of the United States for the southern district of New York.

CALVIN BURR
ag'st
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

CITY AND COUNTY OF NEW YORK, *to wit:*

Calvin Burr, a citizen of the State of New York, complains of the Des Moines Navigation and Railroad Company, being a corporation created by and under the laws of the State of Iowa, and organized and residing in said State of Iowa, and being in custody, &c., of a plea of breach of covenant, for that whereas heretofore, to wit, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and fifty-eight, to wit, at Des Moines, in said State of Iowa, by a certain deed poll there and then made by the defendants, which said deed poll, sealed with the seal of the said defendants, the plaintiff now brings into court here, the date whereof is the day and year aforesaid, it was witnessed that the said defendants, in consideration of the sum of seventeen thousand eight hundred and sixty-eight dollars and eighty cents, to them in hand paid by the said plaintiff, did thereby grant and convey to the said plaintiff the following tracts of land in
5 said State of Iowa, to wit: All of section nine in township eighty-nine, range twenty-eight, and all of section twenty-one in township eighty-nine, range twenty-eight, containing together twelve hundred and eighty acres; and the said defendants, in and by the said deed poll, there and then, in consideration of aforesaid, did warrant the title of said land against all persons whomsoever, and did thereby covenant to and with the plaintiff that the said defendants then had, and that the said plaintiff, by reason of the said deed poll, did and would receive and take a good and perfect title in fee to the said tracts of land and each thereof, as by the said deed poll, reference being thereto had, will more fully and at large appear; yet the said plaintiff in fact saith that the said defendants then and there had no title whatever to the said tracts of land, or either thereof, nor any part thereof, and that the plaintiffs did not then or there, or at any time afterward, by reason of the said deed poll or otherwise, receive, obtain, or take any title whatsoever to the said tracts of land or either thereof, but that the said defendants, to fulfil their said warranty of the title to said lands, and to cause the said plaintiff to receive, obtain, or take a
6 good and perfect title in fee to the said tract of land, although

often requested so to do by the said plaintiff, have hitherto wholly neglected, and still do neglect and refuse. Of all which the said defendants had notice, and so the said plaintiff in fact saith that the said defendants, although often requested to, have not kept the said covenants so by these made as aforesaid, but have broken the same, to the damage of the said plaintiff thirty thousand dollars, and thereof the said plaintiff brings his suit, &c.

J. W. GILBERT, *Att'y for Pl'ff.*

And the said defendants, by Tracy & Olmsted, their attorneys, come and defend the wrongs and injury, when, &c.; and as to the supposed breach of covenant above assigned and alleged by the said plaintiff, then the said defendants say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, the said defendants, because, they say, that they, the said defendants, before and at the time of the making of the said indenture in the said plaintiff's declaration above mentioned, were seized in fee of the said tracts of land, and did then and there, by the said indenture, convey to the said plaintiff a good and perfect title in fee to the same; and this the said defendants are ready to verify. Wherefore the said de-
7 fendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

And for a further plea in this behalf the said defendants, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiff ought not to have or maintain his aforesaid action thereof against them, because, they say, that the said defendants, after making the said indenture in the said declaration mentioned, and before the commencement of this suit, to wit, on the first day of August, 1862, acquired and took a title and estate in fee in the said tracts of land, which said last-mentioned title and estate, by the common law of the State of Iowa, and also by the statutes of the said State of Iowa, did forthwith enure to and vest in the said plaintiff, as the grantee of the said defendants by the said indenture, and that by means of the premises the said plaintiff, before the commencement of this suit, did receive and take a good and perfect title in fee to the said tracts of land, of all which the said plaintiff had notice, without this that the said plaintiff suffered any damage by means of anything in the said declaration
8 mentioned; and this the said defendants are ready to verify. Wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

U. S. circuit court, southern d. of N. Y.

CALVIN BURR
ag't
THE DES MOINES NAVIGATION AND RAILROAD COMPANY.

And the plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them first above pleaded, says that he, said plaintiff, ought not by reason of anything in that plea alleged to be bound from having or maintaining his aforesaid action, because, he says, that the said defendants, at the said time when, &c., where not seized in fee of the said tracts of land, nor did they convey to the said plaintiff any title thereto in manner and form as in that plea in that behalf alleged and this the said plaintiff prays may be enquired of by the country, &c., and the said defendants do the like.

And the said plaintiff, by his attorney aforesaid, as to the said plea of the said defendants by them secondly above pleaded, says that in the said

plaintiff or not by reason of anything in that plea alleged to be
9 bound from having or maintaining his aforesaid action thereof, because, he says, that the said defendants did not, at the said time when, &c., acquire or take any title or estate, nor did such supposed title or estate vest in the said plaintiff, nor did the plaintiff receive or take any title whatsoever in manner and form as in that plea alleged; and this the said plaintiff pray may be enquired of by the country, &c., and the said defendants do the like.

J. W. GILBERT, *Plff Att'y.*

10 Therefore the issues above joined are ordered by the circuit court of the United, for the southern district of New York, to be tried at a stated term of said court appointed to be held at the City Hall, of the city of New York, on the day of , in the year of our Lord one thousand eight hundred and sixty-four, and place last above named, before Hon. Shipman, one of the justices of said court, according to the form of the statute in said case made and provided, came as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned, and the jurors of jury summoned to try the said issue, being called, also came, who to speak the truth of the matters aforesaid being chosen, tried, and sworn, say upon their oath that the said defendant is guilty of the several breaches of covenant above laid to its charge in manner and form as the said plaintiff hath above in that behalf alleged against the said defendant; and the said jury assess the damages of the said plaintiff by reason of the premises, over and above his costs and charges by him in and above his suit in this behalf expended, to the sum of twenty-four thousand two hundred and fifty-five 76-100 dollars, and for these costs and charges to six cents.

Therefore it is considered that the said plaintiff do recover against
11 the said defendant his said damages, costs, and charges by the jurors aforesaid, in form aforesaid assessed, and also thirty-eight 35-100 dollars for his said costs and charges by the said court now here adjudged of increase to said plaintiff and with his assent, which said damages, costs, and charges in the whole amount to twenty-four thousand two hundred and ninety-four 11-100 dollars.

And the said defendant, in mercy, &c.

Judgment signed this 21st November, 1864.

R. E. STILWELL, *Dep. Clerk.*

12 Filed Nov. 2, 1864.

13 U. S. circuit court, S. D. N. York.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY
ads.
CALVIN BURR.

This action was tried at the term of the court held at the city of New York on the first, second, and third days of November, one thousand eight hundred and sixty-four, before the Honorable William D. Shipman, judge, with a jury.

The counsel for the plaintiff, to sustain the issues on his part, gave evidence that the plaintiff was a citizen of the State of New York, and the defendants were a corporation created by the State of Iowa, and also put in evidence a deed, of which the following is a copy, viz:

14 For and in consideration of seventeen thousand eight hundred and sixty-eight and 80-100 dollars the Des Moine Navigation and Railroad Company, a corporation organized under the laws of the State of Iowa,

doth hereby grant and convey to Calvin Burr, of the city and State of New York, the following tracts of land in the State of Iowa, to wit: In Webster County, all of section nine in township eighty-nine, range twenty-eight, containing six hundred and forty acres, also all of section twenty-one in township eighty-nine, range twenty-eight, being a total of twelve hundred and eighty acres; and the said the Des Moine Navigation and Railroad Company doth hereby warrant the title against all persons whomsoever.

In witness whereof, R. S. Burrows, president, and Wm. B. Welles, treasurer, of said company, having been hereunto duly authorized, hereunto set hand and affixed the seal of said company this fifteenth day of November, in the year one thousand eight hundred and fifty-eight.

[SEAL.]

R. S. BURROWS, *President.*
W. B. WELLES, *Treasurer.*

15 STATE OF NEW YORK, *County of New York, ss:*

I certify that I, the subscriber, am a commissioner for Iowa in and for the State of New York; that on the seventeenth day of February, 1859, personally appeared before me R. S. Burrows, president, and Wm. B. Welles, treasurer, personally known by me to be the identical persons whose names are affixed to the within deed as grantors, and acknowledged the instrument to be their voluntary act and deed. Given under my hand and official seal on the day and date above written.

[SEAL.]

JAS. C. PATTERSON,
Commissioner for Iowa in New York.

16 The plaintiff's counsel also gave evidence that the consideration money mentioned in said deed, with interest from its date until the trial of this action, amounted to $24,254 96, and he claimed to recover said consideration money and interest.

The counsel for the defendants, to sustain the issue on their part, put in evidence the act of Congress entitled "An act granting certain lands to the Territory of Iowa to aid in the improvement of the Des Moines River, in said Territory," passed August 8, 1846, and also gave in evidence that the grant made by said act of Congress was fully accepted by the legislature of the State of Iowa, for the purpose therein expressed, and everything was done on the part of the State of Iowa necessary to perfect its title under said act, and that agents afterwards were daily appointed by the governor of said State, who selected the sections designated by odd numbers throughout the whole extent of the grant, such selections embracing all the sections of the public lands designated by odd numbers then remaining unsold and not otherwise disposed of, incumbered, or appropriated, lying in said Territory or State of Iowa, within a strip five miles in width on each side of the River Des Moines, from its mouth to its source at or above the northern boundary of said State; that the said selection by odd numbers was

17 approved by the Secretary of the Treasury of the United States; that the lands mentioned in the declaration in this suit are a part of the lands so selected and approved, and are within the limits of what was the Territory of Iowa, on the 8th August, 1846, and are within five miles of the Des Moines River, but are situated above the Raccoon Fork of said river, and do not lie between said Raccoon Fork and the mouth of said river; that the general assembly of Iowa, on the 24th February, 1847, provided for the election of a board of public works, consisting of a president, a secretary, and a treasurer, and committed to such board the whole subject of receiving and managing the said lands and providing for the construction of the improvement mentioned in said act of Congress, and that said board was duly elected August 2, 1847, and was organized and went into operation

September 22, 1847. To the admissibility of each of which facts the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence a letter written by the Commissioner of the General Land Office to said board of public works, on the 23d February, 1848. The plaintiff's counsel objected to the admissibility of said letter, but the court overruled the objection and admitted the same, and it was put in evidence, being as follows:

18 GENERAL LAND OFFICE, *Feb'y 23d*, 1848.

SIR: Your communication of the 29th of November last, enclosing a copy of yours of the 22d September last, has been received, and would have received an earlier response but for the erroneous and defective surveys along the Des Moines River, which prevented this office from submitting to the Secretary of the Treasury the selections made by the State of Iowa for the improvement of the navigation of that river, under the act of the 8th of August, 1846.

As these surveys have been corrected, action will be had on these selections as soon as possible, and when approved they will be certified to you.

It is not usual to furnish more than a diagram of the grant in cases of this kind, with a certified list of the tracts granted as above mentioned, and these will, of course, be transmitted as they can be prepared.

All the aid that this office can give the board of public works in the discharge of its duties will be cheerfully rendered, and, if it is possible to procure copies of the reports of the topographical bureau of the examinations heretofore made of the Des Moines River, it will afford me pleasure to do so, and forward them to you.

A question has arisen as to the extent of the grant made to Iowa by the act of 8th August, 1846, and the opinion of this office has been requested on that point.

19 By the terms of the law the grant is of an equal moiety in alternate sections of the public lands remaining unsold, and not otherwise disposed of, incumbered, or appropriated, in a strip of five miles in width on each side of the river, to be selected within said Territory, &c., &c., and the proceeds are to be applied in the improvement of the navigation of that river from its mouth to the Raccoon Forks. Hence the State is entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river, within the limits of Iowa.

Very respectfully, your obedient servant,

RICHARD M. YOUNG, *Commissioner.*

CHARLES CORKERY, Esq.,
Secretary of Board of Public Works, Fairfield, Iowa.

20 The defendant's counsel gave in evidence that, without any notice of change of opinion, a proclamation was issued June 19, 1848, signed by the President of the United States, and countersigned by the Commissioners of the General Land Office, ordering into the market some of the lands lying above the Raccoon Fork, which would belong to said State according to the rule laid down in said letter of February 23, 1848, the sale to take place October 16, 1848. To the admissibility of each of which facts the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence a letter written by said board of public works, through its secretary, to the Commissioner of the General Land Office, dated September 18, 1848. The plaintiff's counsel objected to the admissibility of said letter, but the court overruled the objection and admitted the same, and the same was read in evidence, being as follows:

21 OFFICE OF THE BOARD OF PUBLIC WORKS,
Keokuk, Iowa, 18th September, 1848.

SIR: The attention of this office has been called to the proclamation of the President of the United States, bearing date the 19th of June last, for the sale of lands in Iowa, by which I perceive that lands donated to this State for the improvement of the Des Moines River are to be offered for sale at Iowa City on Monday, the 16th October next. These lands are situated above the Raccoon Fork of the Des Moines River, in townships Nos. 79, 80, range Nos. 25, 26, &c., and a sale by the United States will be in conflict with your opinion expressed to me in your letter of the 23d of February last, in which you say that the State is entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river within the limits of Iowa.

Your very liberal opinion has influenced this board to place sixty miles of the contemplated improvement under contract, in addition to the thirty miles first let, and the State would now be greatly embarrassed by any impediments to her favorable prospects in this regard. We believe that the fact of having those lands embraced in the proclamation was an oversight, without any intention to curtail the resources of the State, and that it will be corrected on being discovered.

Very respectfully, your obedient servant,

22 CHARLES CORKERY.

Hon. R. M. YOUNG, *Commissioner G. L. O.*

23 The defendant's counsel offered in evidence a protest of the same date to the admissibility of which the plaintiff's counsel objected; but the court overruled the objection and admitted the same, and it was received as evidence, being as follows:

24 OFFICE OF THE BOARD OF PUBLIC WORKS,
Keokuk, Iowa, 18th September, 1848.

SIR: I enclose you a copy of a letter which I have transmitted by this day's mail to the Commissioner of the General Land Office, and take this opportunity of protesting against the sale of the lands therein referred to.

This protest is based not only upon the act of Congress, donating lands to the State of Iowa for the improvement of the Des Moines River, but also on the decision of the Commissioner of the General Land Office, bearing date 23d February, 1848, in words as follows:

A question has arisen as to the extent of the grant made to Iowa by the act of the 8th of August, 1846, and the opinion of this office has been requested on that point. By the terms of the law the grant is of one equal moiety, in alternate sections of the public lands remaining unsold and not otherwise disposed of, incumbered, or appropriated, in a strip five miles in width on each side of the said river, to be selected within said Territory, &c., and the proceeds are to be applied in the improvement of the navigation of said river from its mouth to the Raccoon Fork. Hence the State is entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river within the limits of Iowa.

25 As this board has had no information that this opinion has been rescinded, we are of the opinion that he will inform you on the subject within the two weeks prescribed for the continuance of the sale.

Respectfully,

CHARLES COCKERY, *Sec'y B. P. W.*

C. NEELY, Esq., *Register*.

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As these surveys have been corrected, action will be had on these selections as soon as possible, and when approved they will be certified to you.

It is not usual to furnish more than a diagram of the grant in cases of this kind, with a certified list of the tracts granted as above mentioned, and these will, of course, be transmitted as they can be prepared.

All the aid that this office can give the board of public works in the discharge of its duties will be cheerfully rendered, and, if it is possible to procure copies of the reports of the topographical bureau of the examinations heretofore made of the Des Moines River, it will afford me pleasure to do so, and forward them to you.

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A question has arisen as to the extent of the grant made to Iowa by the act of the 8th of August, 1846, and the opinion of this office has been requested on that point. By the terms of the law the grant is of one equal moiety, in alternate sections of the public lands remaining unsold and not otherwise disposed of, incumbered, or appropriated, in a strip five miles in width on each side of the said river, to be selected within said Territory, &c., and the proceeds are to be applied in the improvement of the navigation of said river from its mouth to the Raccoon Fork. Hence the State is entitled to the alternate sections within five miles of the Des Moines River throughout the whole extent of that river within the limits of Iowa.

25 As this board has had no information that this opinion has been rescinded, we are of the opinion that he will inform you on the subject within the two weeks prescribed for the continuance of the sale.

Respectfully,

CHARLES COCKERY, *Sec'y B. P. W.*

C. NEELY, Esq., *Register.*

26 The defendant's counsel offered in evidence a letter written by the senators and representatives in Congress from the State of Iowa, to

the Secretary of the Treasury, dated January 8, 1849, the admissibility of which the plaintiff's counsel objected; but the court overruled the objection and admitted the letter, and it was read in evidence, being as follows:

CONGRESS, *January 8th*, 1849.

27 SIR: During the last summer we were much surprised to see lands proclaimed for sale by the President of the United States which had been declared by the General Land Office and considered by the people of Iowa as the property of that State, under the act of 8th of August, 1846, granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines River in said Territory.

On enquiring of the Commissioner of the General Land Office as to the reasons for this course, he informed us that he had changed his original opinion as to the extent of this grant, and was now inclined to think that it was limited to the Raccoon Fork; but no official promulgation of this opinion has yet been given except negatively by proclaiming the lands as above mentioned.

The granting clause in the act of August 8th, 1846, is so clear that we are constrained by a due regard to the interest of the people and State of Iowa to ask your consideration of the subject, and we are further encouraged to take this course as the Commissioner, we are assured, will be pleased to extend to the State the full complement of the grant if the law, in your opinion, should bear that construction.

28 This act of 8th August, 1846, is found in the acts of the first session 29th Congress, page 115.

The first part of the first section designates the object for which the grant was made, to wit: There shall be, and hereby is, granted to the Territory of Iowa, for the purpose of aiding the said Territory to improve the navigation of the Des Moines River from its mouth to the Raccoon Fork, so called, in said Territory.

The next clause describes the grant and its extent, to wit: One equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, incumbered, or appropriated) in a strip five miles in width on each side of the river.

This language is so plain that the extent of the grant is a self-evident proposition, and requires no argument. But the idea is entertained that the improvement governs the extent of the grant. This construction, we beg leave to state, has never obtained. Grants have frequently been made for seats of government, county sites, and the erection of public buildings, but in no case has it been contended that the object of the grant governs the extent of it; otherwise the act passed by Congress on the same day with that now in consideration, (page 140,) to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers, and to connect the same by a canal in the Territory of Wisconsin, must be construed as

29 running the whole length of the Wisconsin River also, as the limitation of that grant to the Fox River, the lakes through which it passes, and the canal, is not more specific than the terms used to designate the grant for the improvement of the Des Moines River.

The reason for this extension of the grant to Iowa above the terminus of the improvement is, moreover, manifest, because near the mouth of the river that improvement will be very expensive, and there the grant does not attach because the lands on the Missouri side of the river below Sullivan's line are in Missouri and those on the Iowa side are the property of individuals; and further most of the lands some distance up the Des Moines have been sold by the government, and as the grant is only of the unsold and unappropriated lands in the alternate sections, the only equivalent for those

which had been sold that could be given are the vacant lands far in the interior from the Mississippi, and hence the terms used in the law.

As the terms of the act, then, are so clear and explicit, and as the reasons for the extension of the grant as provided by that act are so obvious, we respectfully request in our own behalf and in behalf of the State and her citizens, who look with that confidence heretofore so fully justified, that you will not withhold the munificence of Congress and thus cripple this young and rising State in her first great enterprise, and thus involve her in inextricable debt and difficulty.

30 We earnestly request that you will give the necessary instructions for the selections and approval of these lands along the entire route of the Des Moines, as contemplated by the law, as fast as the surveys are made and returned, and that the lands which belong to the State, which have been inadvertently offered and which remain unsold, may be withdrawn from the market and certified to the State also.

We have the honor to be, with great respect, your obedient servants,

A. C. DODGE.
GEORGE W. JONES.
SHEPHERD LEFFLER.
WM. THOMPSON.

Hon. R. J. WALKER, *Secretary of the Treasury.*

31 The defendant's counsel offered in evidence the response of the Secretary of the Treasury, dated March 2, 1849, to the admissibility of which the plaintiff's counsel objected; but the court overruled the objection and admitted the same, and it was read in evidence, being as follows:

32 TREASURY DEPARTMENT, *March* 2, 1849.

GENTLEMEN: I have the honor to acknowledge the receipt of your communication of 8th January last, and accompanying papers, on the construction of the act of Congress "granting lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines River, in said Territory," approved 8th August, 1846. I concur with you in the views contained in your communication, and am of the opinion that the grant in question extends, as therein stated, on both sides of the river from its source to its mouth, but not to lands on the river in the State of Missouri.

I have transmitted your communication and accompanying papers with a copy of this letter to the Commissioner of the General Land Office.

I have the honor, &c.,

R. J. WALKER, *Sec. of Treasury.*

Messrs. A. C. DODGE, G. W. JONES, L. LEFFLER, W. THOMPSON.

33 The defendant's counsel gave in evidence that the Secretary of the Treasury, on the same day, transmitted a copy of his letter of that date to the Commissioner of the General Land Office, and accompanied it with an order of the same date, which also the defendant's counsel offered in evidence. The plaintiff's counsel objected to the admissibility of such fact and such order; but the court overruled the objection and admitted the same, and said order was also read in evidence, being as follows:

34 TREASURY DEPARTMENT, *March* 2, 1849.

SIR: For your information and government on the subject to which it refers I inclose a copy of a letter, addressed by me under this date, to members in both houses of Congress from the State of Iowa, with reference to the

construction of the act of 8th of August, 1846, granting certain lands to the Territory of Iowa to aid in the improvement of the navigation of the Des Moines River. I also inclose a letter to which the within is a reply, and accompanying papers.

Very respectfully,

R. J. WALKER.

R. M. YOUNG, *Commissioner.*

35 The defendant's counsel offered in evidence a communication from the Commissioner of the General Land Office, dated June 1, 1849, to the admissibility of which plaintiff's counsel objected, but the court over ruled the objection and admitted the same, and it was read in evidence, being as follows :

36 GENERAL LAND OFFICE, *June* 1, 1849.

GENTLEMEN : The Secretary of the Treasury having decided that the grant to the State of Iowa, under the act of the 8th of August, 1846, extended along the Des Moines River to its source, and that it did not stop at the Raccoon Fork, as this office had previously decided, you are hereby directed to withhold from sale all lands situated on the odd-numbered sections within five miles on each side of that river above the Raccoon Fork. Inclosed I send you a diagram, upon which the State selections above that point are colored yellow.

I have also to request that you will make out a list, showing the sales and locations which have been made within these selections as it is designed to endeavor to procure some legislative action on the part of Congress, confirmatory of them. The diagram inclosed extends to 83 N., 26 W., being as far as the surveys have progressed in that direction.

I am, very respectfully, your obedient servant,

R. M. YOUNG, *Commissioner.*

REGISTER AND RECEIVER, *Iowa City, Iowa.*

37 The defendant's counsel offered in *in* evidence a letter from the Commissioner of the General Land Office, dated December 19th, 1849, The plaintiff's counsel objected to the admissibility thereof, but the court overruled the objection and admitted the same, and it was read in evidence, being as follows:

38 GENERAL LAND OFFICE, *December 19th*, 1849.

SIR: A letter has been received at this office from the Hon. A. C. Dodge and the Hon. Geo. W. Jones, enclosing one from you to the former, dated the 30th ulto., requesting that you may be furnished with a list of the Des Moines River grant above the Raccoon Fork. In reply I have to state that said list has not been furnished, for the reason that the posting of the land warrants in the Iowa City district was not completed on the books of this office until recently. Said list is now in the course of preparation, and will be ready for transmission at an early day. In the latter part of your letter you say the lists heretofore forwarded of land below the fork have been furnished the secretary of state instead of the board, who are the rightful and only agents of the State for said land.

In the absence of evidence showing the right of another to receive confirmed lists of State grants it is usual to send them to the secretary of state. such is the case at present in relation to this grant. If, however, you will furnish this office with evidence as to your right as secretary of the board of

public works to receive said lists and to correspond with this office in relation thereto they will hereafter receive the desired direction.

39 I am, sir, your obedient servant,

J. BUTTERFIELD, *Commissioner.*

JESSE WILLIAMS, Esq., *Iowa City, Iowa.*

40 The defendant's counsel gave in evidence that on the 11th January, 1850, the Commissioner of the General Land Office made a report to the Secretary of the Interior showing the amount of land which had been granted to the several States for internal improvements, and that the amount charged to Iowa in said report is 825,078 acres, and that the following note is contained in said report in reference to said lands so charged to Iowa, as follows: "This amount, in accordance with the decision of the Secretary of the Treasury of the 2d of March, (1849,) eighteen hundred and forty-nine, will be increased by the unadjusted portion of the grant for the improvement of the Des Moines River, situated between the Raccoon Fork and the source of said river, estimated to contain about 900,000 acres." And that on the 13th March, 1850, the Commissioner of the General Land Office submitted to the Secretary of the Interior three several lists of land, the first of which had the following heading: "No. 1, showing the tracts falling within the limits of the Des Moines grant above the Raccoon Fork, &c., under the decision of the Secretary of the Treasury of March 2, 1849."

The plaintiff's counsel objected to the admissibility of each of said facts, but the court overruled the objection and received the evidence. The

41 defendant's counsel put in evidence the following decision of the Secretary of the Interior:

42 DEPARTMENT OF THE INTERIOR,
Washington, April 6th, 1850.

SIR: Having considered the question submitted to me connected with the claim of the State of Iowa to select, under the act of August 8th, 1846, lands for the improvement of the Des Moines River, I am clearly of the opinion that you cannot recognize the grant as extending above the Raccoon Fork without the aid of an explanatory act of Congress. It is clear to my mind, from the language of the act of August 8th, 1846, itself, that it was not the intent of the act to extend it further. My construction is confirmed by the report of the committee and the accompanying papers. If in any report to Congress you have recognized the grant as extending to the source of the river, it will be proper to correct it, that Congress, if they see fit, may extend the grant. The opinion expressed by the late Secretary of the Treasury on the subject is entitled to great respect, but I cannot concur in it, and the law not having been carried into effect by him, his opinion, merely expressed, is open for reversion.

The lists of selections and and other papers submitted with your letter of the 13th ultimo are herewith returned.

As Congress is now in session and may take action on the subject, it will be proper, in my opinion, to pospone any immediate steps for bring-

43 ing into market the lands embraced in the State's selections.

I am, sir, very respectfully, your obedient servant,

T. EWING, *Secretary.*

The COMMISSIONER *of the General Land Office.*

44 The defendant's counsel gave in evidence that on the 14th April, 1850, the senators and representatives from Iowa protested against said decision, and appealed from it to the President of the United States, and the President referred the matter to the Attorney General, Mr. Reverdy

Johnson. The Attorney General, on the 19 July, 1850, made his report on the matter so referred, giving it fully, in his opinion, that, by the terms of the grant itself, it extended along the Des Moines River up to its very source; that before the said opinion was promulgated, or any further action was taken upon this matter, the question was submitted to a new Attorney General, Mr. Crittenden, who, on the 30 June, 1851, decided that, in his opinion, the grant did not extend above the Raccoon Fork, and that the Secretary of the Interior (Mr. A. H. H. Stuart) at first, July 26, 1851, concurred in Mr. Crittenden's opinion, but afterwards consented to bring the whole matter before the President and cabinet; and after its consideration there, a decision was made which is indicated in the letter of Mr. Stuart, dated October 29, 1851, which letter the defendant's counsel offered in evidence. The plaintiff's counsel objected to the admissibility of each of said facts and of said letter, but the court overruled the objection and received the evidence, and said letter was read in evidence, as follows:

45 DEPARTMENT OF THE INTERIOR,
Washington, October 29, 1851.

SIR: I herewith return all the papers in the Des Moines case, which were recalled from your office about the first of the present month. I have reconsidered and carefully revised my decision of the 26th of July last, and in doing so find that no decision which I can make will be final, as the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country; and although my own opinion on the true construction of the grant is unchanged, yet, in view of the great conflict of opinion among the executive officers of the government, and also in view of the opinion of several eminent jurists which have been presented to me in favor of the construction contended for by the State, I am willing to recognize the claim of the State and to approve the selections without prejudice to the rights, if any there be, of other parties, thus leaving the question as to the proper construction of the statute entirely open to the action of the judiciary.

You will please, therefore, as soon as may be practicable, submit for my approval such lists as have been prepared, and proceed to report for like approval lists of the alternate sections claimed by the State of Iowa above the Raccoon Fork as far as the surveys have progressed or may hereafter
46 be completed and returned.

I am, sir, very respectfully, your obedient servant,
ALEX. H. H. STUART, *Secretary.*

To the COMMISSIONER *of the General Land Office.*

47 The defendant's counsel gave in evidence that on the following day, namely, October 30, 1851, three lists of lands were prepared in the General Land Office, the purposes of which, as stated in the heading, being as follows: "List No. 1, showing the tracts falling within the limits of the Des Moines grant above the Racoon Fork of the Des Moines River, so far as the surveys have extended, under the decision of the Secretary of the Treasury of 2d March, 1849, that such grant extended to the north boundary of the State." "List No. 2, showing tracts disposed of within those limits in the interval between the date of one of the previous orders limiting the grant and one of those extending it above the fork." "List No. 3, showing the vacant lands subject to the claim of the State;" and that the third of said lists, on being presented to the Secretary of the Interior, received his approval, with an explanatory statement, and the defendant's counsel offered said approval and statement in evidence. The plaintiff's counsel objected to the admissibility of the said several facts and of said approval and state-

ment; but the court overruled the objection and received the evidence and said note, and said note was read in evidence, being as follows:

"DEPARTMENT OF THE INTERIOR,
"*October 30th*; 1851.

"The selections embraced in the within list (No. 3) are hereby ap-
48 proved, in accordance with the views expressed in my letter of the 29th instant to the Commissioner of the General Land Office, subject to any rights which may have existed at the time the selections were made known at the land office by the agents of the State, it being expressly understood that this approval conveys to the State no title to any tract or tracts which may have been sold or otherwise disposed of prior to the receipt by the local land officers of the letter of the Commissioner of the General Land Office, communicating the decision of Mr. Secretary Walker, to the effect that this grant extended above the Racoon Fork.

"ALEX. H. H. STUART, *Secretary.*"

The defendant's counsel gave in evidence that the following amounts of lands were approved and certified at the following times to the State of Iowa under the grant of August 8th, 1846, all lying above the Raccoon Fork, viz:

October 30th, 1851	214,391.58 acres.
March 10th, 1852	143,908.37 acres.
December 17th, 1853	33,142.43 acres.
December 30th, 1853	12,813.51 acres.
	404,255.89

And that among such lands so certified and approved were the lands mentioned in the declaration in this suit, and that the following is the heading of the list which was approved by the Secretary of the Interior
49 on the 17th of December, 1853, together with the terms of approval. A similar heading and approval was append to the list approved on the 30th of the same month. "A list showing the vacant lands in the odd-numbered sections above the Raccoon Fork and within five miles of the Des Moines River, so far as the surveys have progressed, falling to the State of Iowa under the act of the 8th August, 1846, as construed by the Secretary of the Treasury in his letter of the 2d of March, 1849, and of the Secretary of the Interior of the 29th of October, 1851, which have not heretofore been approved;" and that said list was approved in these words:

"DEPARTMENT OF THE INTERIOR, *December 17th*, 1853.

"The selections in the within list are hereby approved to the State of Iowa, under the act of the 8th of August, 1846, without prejudice to the rights, if any there be, of other parties.

"R. McCLELLAND, *Secretary.*"

To the admissibility of each of which facts the plaintiff's counsel objected; but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence a letter written by the Secretary of the Interior, August 23, 1852. The plaintiff's counsel objected to the admissibility of such letter; but the court overruled the objection, and admitted the same, and the same was read in evidence, being as following:

50 DEPARTMENT OF THE INTERIOR,
Washington, August 23d, 1852.

SIR: I have examined the question involved in the appeal of Honorable A.

C. Dodge, George W. Jones, and Bernhart Henn, of Iowa, from the judgment of the Commissioner of the General Land Office in relation to their application for the issue of patents on the sales and locations of portions of the odd-numbered sections along the Des Moines River, above the Raccoon Fork, which had been made prior to the receipt by the district land office of Mr. Secretary Walker's decision of the 2d March, 1849, and have to state that as I approved the selections above the Raccoon Fork with the express understanding that that approval should not convey to the State any title to tracts which might have been sold or otherwise disposed of prior to receipt of Mr. Walker's decision, the issuing of patents on the sales and locations in question is in perfect accordance with the views expressed in my letter to the Commissioner of the 29th October last, and the terms of approval of the selections on the following day.

I am, sir, very respectfully, your obedient servant.

ALEX. H. H. STUART, *Sec'y.*

THE ACTING COMMISSIONER *of the General Land Office.*

51 GENERAL LAND OFFICE, *January 6th*, 1854.

SIR: Herewith I enclose a copy of a list of lands falling to the State of Iowa under the act of 8th of August, 1846, selected by the State under the eighth section of the act of 4th September, 1841, and approved before the grant for the improvement of the Des Moines River was adjusted as far as the township embraced by the lists, which was approved by the Secretary of the Interior on the 30th ultimo. The quantity of land thus approved under the act of 8th of August, 1846, is twelve thousand eight hundred and thirteen and fifty-one one hundredths of an acre, (12,813.51.) These lands were selected on the 20th July, 1850, and embraced by lists Nos. 49 to 54, inclusive, and in lieu thereof the State is entitled to select an equal quantity elsewhere.

Be pleased to acknowledge the receipt of this communication.

I am, very respectfully, your obedient servant,

JOHN WILSON, *Commissioner.*

THOMAS H. BENTON, Jr., Esq'r,
Superintendent Public Instruction, Iowa City, Iowa.

52 The defendant's counsel offered in evidence a letter written by the Commissioner of the General Land Office, January 6, 1854. The plaintiff's counsel objected to the admissibility thereof, but the court overruled the objection, and admitted the same, and it was read in evidence, being as follows:

53 The defendant's counsel gave in evidence that the lands given by the United States to Iowa on its becoming a State, by the general act of Congress passed September, 1841, giving 500,000 acres to each new State on its coming into the Union, were devoted by the State of Iowa to educational purposes; that 12,813.51 acres had been selected under that act from among the sections of odd numbers lying within five miles of the Des Moines River, and above the Raccoon Fork, which same lands, according to the construction of the act of August 8, 1846, prevailing at the date of said letter of January 6, 1854, had been previously appropriated by Congress to the Des Moines River improvement, and that upon such fact coming to the knowledge of the General Land Office notice was given to the State superintendent of public instruction that the State was entitled to select an equal quantity of land elsewhere in lieu of what had been erroneously so selected for school purposes, as part of the State's five hundred thousand acres. The plaintiff's counsel objected to the admissibility of each said fact, but the court overruled the objection and received the evidence.

The defendant's counsel gave evidence that on the 21 March, 1856, the Commissioner of the General Land Office decided that the grant by the act of August 8, 1846, did not extend above the Raccoon Fork, and there-
54 upon the matter was brought before the Secretary of the Interior, and by him was referred to the Attorney General, Mr. Cushing, who delivered an extended opinion thereon, and the defendant's counsel offered said opinion in evidence. The plaintiff's counsel objected to the admissibility of each of said facts and of said opinion, but the court overruled the objection, and received the evidence, and the defendant's counsel read said opinion in evidence, the material parts of which are as follows:

55 *Extract from opinion of Att'y Gen'l Cushing.*

In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did in this respect with deliberation, what you did, without the questions involved being suggested to you, was in each case done by the competent legal authority, and binds the government. One Secretary has no more lawful power to undo a thing lawfully done by his predecessor in a matter of grant than in a matter of account; no more right where a settlement is in favor of a third party than where it is favor of the United States. When a thing is decided and done by the head of a department, acting within the scope of his lawful authority, it can be reversed by his successor only on the ground of mistake in a matter of fact, or the discovery and production of material new testimony. (Mr. Crittenden's opinion of Dec. 28, 1852, MS. See also Bank of Metropolis *vs.* the United States, 15 Peters, page 400; *ex parte* Randolph, 2 Brocken, p. 470.)

If the acts of Mr. Stuart and yourself in this respect had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would have had their remedy at law. But what you have done is final as respects the United States. But have you erred in continuing to follow the line of action which your predecessor had prescribed, and which the
56 Commissioner of Public Lands assumed as settled in presenting to you for approval lists made out on the premises of the subsisting decision of Mr. Stuart? And if you erred (inadvertently) in thus approving selections made by the State above the Raccoon Fork, shall you now stop and change the rule of action which Mr. Stuart has prescribed to the Commissioner? The answer to these questions is not included in the preceding conclusions. It is one thing to undo an act done, and quite another thing to cease to persevere in a previous line of action as to acts of a continuous nature.

It might with much plausibility be argued that while Mr. Walker's order was an opinion merely, and did not bind Mr. Ewing; so what Mr. Stuart did, though final as to lands actually approved, was but a precedent when a new list comes up, and may be rejected by you as a precedent, though it cannot be reversed or annulled as an act; that the disposition of the particular lands made by him is irrevocable, but the principle on which he did it is open to re-examination as respects any other lands in the same right claimed by the State, and that in executing the same law you are to execute it according to your own understanding of its force and effect. That may be so, and yet the contingency is not exactly of the application of a precedent to a new case, for the grant to Iowa is one thing, although it be composed of
57 parts or of new sets of *of* parcels appertaining to the general whole. Mr. Stuart decided to adopt the opinion of Mr. Walker, which carried the grant above the Raccoon Fork, and he proceeded to execute, and did execute, that decision in part, and the true question is of the completion of the exe-

cution by you of what had been partially executed by Mr. Stuart. I think it must be a clear case of manifest illegality in the work commenced and half executed by one secretary to justify the abandonment of it by his successor. Is the present such a case of palpable violation of law? That cannot be pretended in face of the opinions of Mr. Walker and Mr. Johnson, and the administrative acquiescence in those opinions on the part of Mr. Stuart. In my judgment it is not for the good of the public service, while it is prejudicial and sometimes grossly unjust to private interests concerned, for the executive to break off things half done because of mere doubts of the legality of the decisions upon which commencement was made, or even the belief that upon better reflection at the outset a different decision would have been rendered. To indulge in such oscillation of action under the influence of ordinary causes of perturbation is not seemly on the part of the government.

In the present case of lands above the Raccoon Fork claimable by the State within its limits, twenty-six fifty-sixth parts (nearly half) the
58 United States have already recognized as belonging to the State. I think you may, if you choose, will consider that a determination of the question proper to be acquiesced in by you as a settled fact of administration. * * * * * I advise, therefore, that you propose to the State of Iowa and its assigns to acquiesce in and accept the decision of Mr. Stuart as final, and to approve selections accordingly, provided the State or its assigns will themselves agree to acquiesce in and accept that decision as final. If they refuse to treat that decision as final, they cannot expect you to do so. They should be bound if you are. If they consent to enter into satisfactory stipulations of contract to that effect, you can with safety award to them the residue of the claim up to the northern boundary of the State.

59 The defendant's counsel offered in evidence a communication from the Secretary of the Interior, dated June 9, 1856.

The plaintiff's counsel objected to the admissibility thereof, but the court overruled the objection and admitted the same, and the same was read in evidence, being as follows:

60 DEPARTMENT OF THE INTERIOR, *June 9th*, 1856.

SIR: I return herewith the papers in reference to the grant for the improvement of the Des Moines River, which accompanied your report of the 24th of March, and inclosed therewith several letters and arguments which have been received here since the date of your report. Having submitted the subject to the Attorney General for his opinion upon the questions involved, I inclose a copy of such opinions, furnished me under date of the 29th ult., and also a letter under date of the 5th instant, from the Hon. Reverdy Johnson, the attorney for the claimants under grant, in regard to the conditions upon which subsequent approvals up to the limits of the State of Iowa are recommended by the Attorney General to be made.

In the subsequent action upon selections not yet approved, I have concluded to be governed by the advice of the Attorney General as contained in the paragraph, near the close of such opinion, beginning with the words, "I advise, therefore, that you propose to the State of Iowa and its assigns," and ending with, "you can with safety award to them the residue of the claim up to the northern boundary of the State."

It will be perceived from the indorsement of Mr. Johnson's letter
61 above referred to, that he has undertaken to procure the assent of the State and its assigns to the conditions referred to, so that the necessity is obviated of any direct proposition to that effect on the part of the

department, but no further action will be taken until the parties are heard from on this point.

In the certificate of approval hereafter prepared for my signature on any lists submitted, the fact should be stated that the approval being based on the prior action of the department, and upon the ground that the grant is to be confirmed to the northern boundary of the State of Iowa, the acceptance by the State and its assigns would be considered an acquiesence on their part in this limit and on abandonment of all claim beyond it, as it is upon this basis alone I can feel justified in yielding my assent to the claim prefered.

Should the assent of the parties be given in writing, the certificate of approval will be so varied from the language as to conform to that state of facts, but without losing sight of the real groundwork of my assent to the approval.

Respectfully your obedient servant,

R. McCLELLAND, *Secretary.*

To the Hon. THOMAS A. HENDRICKS,
Commissioner of the General Land Office.

62 The defendant's, counsel gave evidence that application to the Secretary of the Interior subsequently was made by Mr. R. Johnson, for the issue of patents for lands which had been certified and approved to the State of Iowa under the act of August 8th, 1846, and that the Secretary made reply thereto in writing November 10, 1856, and the defendant's counsel offered to read said reply in evidence. The plaintiff's counsel objected to the admissibility of said facts and said reply, but the court overruled the objection and admitted the evidence, and the defendant's counsel read said reply in evidence, being as follows :

63 DEPARTMENT OF THE INTERIOR, *November 10th*, 1856.

SIR : Having duly considered the subject brought to my attention personally a few days since, and specially referred to in your letter of this date, I have not been able to satisfy myself that the department has any power to issue patents where the law not only does not authorize it to be done, but provides another mode for the passing of the title to the lands in question ; and the practice having been in accordance with this view of the absence of authority, I deem it proper to adhere to it.

In the opinion of the Attorney General of the 29th May last, in the Des Moines River case, it is so stated: In so far as regards selections already approved, whether by yourself or by Mr. Stuart, it is clear that the government cannot undo that. What Mr. Stuart did in this respect with deliberation, what you did without the question involved being suggested to you, was, in each case, done by the competent legal authority, and binds the government. One Secretary has no more lawfull power to undo a thing lawfully done by his predecessor in a matter of grant than in a matter of account—no more right where a settlement is in favor of a third party than where it is in favor of the United States. Where a thing is decided

64 and done by the head of a department acting within the scope of his lawfull authority, it can be revised by his successor only on the ground of mistake in a matter of fact, on the discovery and production of material new testimony—(Mr. Crittenden's opinion of Dec. 25th, 1852, U. S. See also Bank of Metropolis *vs.* United States, 15 Peters, p. 400 ; ex parte Randolph, 2 Brocken, p. 470.) If the acts of Mr. Stuart and yourself in this respect had undertaken (as they do not) to dispose of any contending rights of third parties, the latter would have had their remedy at law. But what you have done is final as respects the United States.

In the foregoing views of the Attorney General I have concurred; and for the reason that the acts of approval by Mr. Stuart and myself have divested the United States of the title, I can see still further ground to decline issuing a patent or patents, as that would be assuming that the title had not yet passed and the question would be yet open for adjustment like selections not yet approved.

Respectfully your obedient servant,

R. W. McCLELLAND, *Secretary.*

To Hon. R. JOHNSON, *Baltimore, Md.*

65 The defendant's counsel gave in evidence that among the lands approved and certified to the State of Iowa under said act of 8th August, 1846, on or prior to the 30 Dec., 1853, were the lands mentioned in the declaration in this suit; that no lands have been so certified and approved under said act since December 30, 1853; that all the lands which were so certified and approved to the State of Iowa were, by the General Land Office at Washington, always thereafter, (up to the time when the decisions of the Supreme Court of the United States on the construction of the act of August 8th, 1846, was rendered at the December term of 1859, 1860,) reserved from sale or pre-emption, and were by said Land Office considered and held, and on its files and maps were indicated as appropriated to the special purpose of satisfying the said grant of 8th August, 1846, and as having passed to the State under said grant, and the acts of the government thereunder, and that after the making of said grant by the act of Congress of August 8, 1846, the State proceeded from time to time, as in said act authorized, to sell and dispose of said lands, applying the proceeds to the improvement of the Des Moines River, as contemplated in said act, and on 9th June, 1854, the State, by its authorized agents, made a contract with the said defendants,

66 the Des Moines Navigation and Railroad Company, in and by which the said company agreed to finish said improvement, as contemplated in said act of Congress, and specified in said contract, and to expend for that purpose all necessary sums, to the amount of $1,300 00, and in consideration of such contract and expenditure, and in payment for the same, the State sold and agreed to convey to said company, from time to time, and in the manner provided by said act of Congress, the whole balance of the lands which had been certified and approved to the State under said act, and which then remained unsold, and all other land which should be thereafter certified and approved to the State of Iowa under said act; that among the lands thus sold to said company were the lands mentioned in the declaration in this suit; that after the making of said contract the said company proceeded with the work upon said improvement, and as the said improvement progressed, and in accordance with said act of Congress, the State from time to time, by its regular and authorized officer, issued to said company in payment for work done by it upon said improvement, and in pursuance of the aforesaid contract, sundry certificates, in form and substance as follows:

67 "OFFICE REGISTER OF THE DES MOINES RIVER IMPROVEMENT,

"*Ottumwa, May* 14, 1855.

"I certify that the following lands were sold by me on this day of to the Des Moines Navigation and Railroad Company, in pursuance of the contracts and agreements with the said company for the construction of the said Des Moines River improvement, to wit.

(Here follows a long list of lands set forth specifically by section, township, and range, together with the number of acres in each tract, respectively, including the lands mentioned in the declaration in this suit.)

(Signed) GEORGE GILLESPIE, *Register, &c.*"

That the said George Gillespie was at the said dates register of the Des Moines improvement, and was the proper person to transfer said lands and issue the said certificates, and that the General Land Office decided in 1856 not to certify any more lands to the State under the grant of 8th August, 1846, and that thereupon the said defendants suspended work upon said improvement. To the admissibility of each of which facts the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence a joint resolution of the general assembly of the State of Iowa, passed March 22d, 1858. The plaintiff's counsel objected to the admissibility thereof, but the court overruled the
68 objection and received the evidence, and the same was read in evidence, being as follows :

"Whereas the Des Moines Navigation and Railroad Company have heretofore claimed, and do now claim, to have entered into certain contracts with the State of Iowa, by its officers and agents, concerning the improvement of the Des Moines River in the State of Iowa; and whereas disagreements and misunderstandings have arisen, and do now exist between the State of Iowa and said company, and it being conceived to be to the interests of all parties concerned to have said matters and all matters and things between said company and the State of Iowa settled and adjusted : Now, therefore, be it

"*Resolved by the general assembly of the State of Iowa,* That for the purpose of such settlement, and for that purpose only, the following propositions are made by the State to said company: that the said company shall execute to the State of Iowa full releases and discharges of all contracts, agreements and claims with or against the State, including rights to water rents which may have heretofore or do now exist, and all claims of all kinds against the State of Iowa and the lands connected with the Des Moines River improvement, excepting such as are hereby by the State se-
69 cured to the said company, and also surrender to said State the dredge-boat and its appurtenances belonging to said improvement, and the State of Iowa shall, by its proper officers, certify and convey to the said company all lands granted by an act of Congress approved August 8th, 1846, to the then Territory of Iowa to aid in the improvement of the Des Moines River, which have been approved and certified to the State of Iowa by the general government, saving and excepting all lands sold or conveyed or agreed to be sold or conveyed by the State of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant, and said company or its assignees shall have right to all of said lands as herein granted to them as fully as the State of Iowa could have under or by virtue of said grant, or in any manner whatever, with full power to settle all errors, false locations, omissions, or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company, and the State to hold all the balance of said lands, and all rights, powers, and privileges under and by virtue of said grant entirely released from any claim by or through said company; and it is understood that among the lands excepted and not granted by the State to said company are 25,487 87-100 acres lying immediately above
70 Raccoon Fork, supposed to have been sold by the general government, but claimed by the State of Iowa.

"And it is further agreed that said company release and convey to the State of Iowa or its representatives, all materials of every kind and description, prepared for or intended for the construction of locks or dams in said improvement, wheresoever the same may be, and the State shall take the existing contracts, but no other liabilities of any name or nature, except as herein provided, for constructing or repairing the work on said improvement

at Keosaugua, Bentonsport, Plymouth, and Croton, and no other or different, with all liabilities and advantages arising upon said contracts, and percentage retained thereon, excepting that the company shall pay all estimates for work done or material prepared up to this date, beyond the percentage retained from the contractors under their agreements, and the said company shall be discharged from all liability for the claims of the officers of the State for services or salaries.

"The said company hereby agree to pay the State the sum of twenty thousand dollars, which sum shall be paid to the order of the commissioner of the Des Moines River improvement as fast as he may require the same to liquidate existing liabilities against said Des Moines River
71 improvement, on thirty days' notice given to said company, at their office, in the city of New York, and any bonds or certificates of indebtedness against said improvement, not exceeding in amount the sum of $11,000, which are now due and unpaid are to be received in part payment of said sum of twenty thousand dollars. *Provided*, That no liabilities assumed by the State in this contract shall be a charge against the State in her sovereign capacity; but all such liabilities, if any, shall be chargable upon and payable out of the remaining lands belonging to the Des Moines River grant. *And provided also*, That if Congress shall permit a diversion of the lands of said Des Moines River grant, or the title thereto shall become vested in the State, so as to become subject to grant, the said remaining lands, after the payment of all the liabilities as aforesaid against said improvement, and the completion of such locks and dams on the Des Moines River as the legislature shall direct, shall be granted to the Keokuk, Fort Des Moines, and Minnesota Railroad Company, to aid in the construction of a railroad up and along the valley of the Des Moines River, upon such terms and in such manner as the legislature may provide, one fourth of which said lands shall be applied by said company to aid in the construction of said road above
72 the city of Des Moines. *And provided further*, That if the said Des Moines Navigation and Railroad Company shall ratify and except the propositions for a contract by filing a written acceptance thereof in the office of the Secretary of State within sixty days from the passage of this joint resolution, then this contract shall be in force and bind both of the parties thereto."

The defendant's counsel gave in evidence that the Des Moines Navigation and Railroad Company ratified and accepted the propositions for a contract, in said resolutions contained, in the manner and within the time therein provided for; that the company paid to the State the sum of $20,000 in cash, and released and conveyed to the State the dredge-boat and materials in the resolution mentioned, which were of the cash value of more than $100,000, and in all respects on its part complied with the terms of settlement expressed in said resolution. To the admissibility of each of which facts the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence a patent or deed executed May 18, 1858. The plaintiff's counsel objected to the admissibility thereof,
73 but the court overruled the objection and the said deed or patent was read in evidence, being as follows:

This indenture, made this 18th day of May, one thousand eight hundred and fifty-eight, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursuance of the contracts and agreements between the State of Iowa and the said Des Moines Navigation and Railroad Company for the improvement of the navi-

gation of the Des Moines River in the State of Iowa, and in pursuance of a joint resolution of the general assembly of the State of Iowa, approved the 22d day of March, 1858, does hereby sell, grant, bargain, and convey to the said Des Moines Navigation and Railroad Company the following described lands, to wit: All lands granted by an act of Congress approved August 8th, 1846, to the then Territory of Iowa to aid in the improvement of the Des Moines River, which have been approved and certified to the State of Iowa by the general government, saving and excepting all lands sold and conveyed, or agreed to be sold or conveyed, by the State by its officers and agents prior to the 23d day of December, 1853, under said grant, and said
74 company or its assigns shall have right to all of said lands so herein granted to them as fully as the State of Iowa could have under or by virtue of said grant, or in any manner whatever, with full power to settle all errors, false locations, omissions, or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company, and the State to hold all the balance of said lands, and all rights, powers, and privileges under and by virtue of said grant entirely released from any claim by or through said company. And it is understood that among the lands excepted and not granted by the State to said company are 25,487.87 acres lying immediately above Raccoon Fork, supposed to have been sold by the general government, but claimed by the State of Iowa.

To have and to hold the above-described lands and each and every parcel thereof, with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging or appertaining unto the Des Moines Navigation and Railroad Company, their successors and assigns forever in fee simple.

In testimony whereof, I, Ralph P. Lowe, Governor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.
75 Given under my hand, at the city of Des Moines, the day and year first above written, and of the State of Iowa.

[L. S.] RALPH P. LOWE.

By the governor:
ELIJAH SELLS, *Secretary of State,*
By JNO. M. DAVIS, *Deputy.*

This is to certify that the foregoing deed was received from the governor June 10th, 1858, and recorded in Des Moines River Records, Book A, pages 45 and 46, June 18th, 1852 (62.)

T. S. PARRIN,
Register of State Land Office,
By D. S. WARREN, *Deputy.*

76 The defendant's counsel gave in evidence that the State of Iowa caused said deed or patent to be duly recorded in Iowa, and a duplicate or copy of it to be filed in the office of the Commissioner of the General Land Office at Washington, with a list of the lands intended to be conveyed thereby, amounting to 213,483.39 acres, including the two sections mentioned in the complaint in this suit. To the admissibility of which facts the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel offered in evidence another deed or patent, executed May 3d, 1858.

The plaintiff's counsel objected to the admissibility thereof, but the court overruled the objection, and said deed or patent was read in evidence, being as follows:

77 This indenture, made this third day of May, 1858, by and between the State of Iowa, party of the first part, and the Des Moines Navigation and Railroad Company, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of one dollar paid by the parties of the second part, and in pursurnce of the contracts and agreements between the State of Iowa and the said Des Moines Navigation and Railroad Company for the improvement of the Des Moines River, does hereby sell, grant, bargain, and convey to the said Des Moines Navigation and Railroad Company the following referred to and described lands, to wit:

(Here follows a description of several thousand acres of land, set forth specifically by section, township, and range, and including the lands mentioned in the declaration in this suit.)

To have and to hold the above-described lands and each and every parcel thereof, with all the rights, privileges, immunities, and appurtenances of whatever nature thereunto belonging or appertaining, unto the Des Moines Navigation and Railroad Company, their successors and assigns, forever in fee simple.

In testimony whereof, I, Ralph P. Lowe, govornor of the State of Iowa, have caused the great seal of the State of Iowa to be hereunto affixed.

78 Given under my hand, at the city of Des Moines, the day and year first above written, and of the State of Iowa the twelfth year.

[SEAL.] (Signed) RALPH P. LOWE.

By the governor:

(Signed) ELIJAH SELLS, *Secretary of State.*

This is to certify that the foregoing deed was received from the governor June 10, 1858, and recorded in Des Moines River Records, Book A, pages 41, 42, 43, and 44, June 18, 1858.

(Signed) T. S. PARRIN,
Register of the State Land Office.
By D. S. WARREN, *Deputy.*

79 The defendant's counsel gave in evidence that the decision of the Supreme Court of the United States, interpreting the act of August 8, 1846, in the case of Litchfield *v.* the Dubuque & Co., (reported in 23 Howard, 66,) was pronounced at the December term of 1859–1860; to the admissibility of which fact the plaintiff's counsel objected, but the court overruled the objection and received the evidence.

The defendant's counsel read in evidence the joint resolutions of the Congress of the United States passed March 2, 1861, and the act of Congress passed July 12, 1862; the plaintiff's counsel objecting to the admissibility thereof, but the court overruling the objection and receiving said resolution and act in evidence.

The defendant's counsel put in evidence, from the statutes of Iowa, section 2, 210, of the Code of Iowa, revision of 1860, in these words:

"Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, enures to the benefit of the grantee."

80 The plaintiff's counsel gave in evidence the act of Congress passed May 15, 1856, entitled "An act making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in said State," and also an act of the general assembly of the State of Iowa, passed July 14, 1860, entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa in alternate

sections, to aid in the construction of railroads in said State,' approved May 15th, 1856." The plaintiff also gave in evidence that said last-mentioned act was duly published in the papers therein mentioned. To the admissibility of which said two acts, and of such fact of publication, the defendant's counsel in time objected, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision.

The plaintiff's counsel also gave in evidence the articles of incorporation of the Dubuque and Pacific Railroad Company; to the admissibility of which the defendant's counsel objected, but the court overruled the objection and received the evidence, to which decision the defendant's counsel objected. The said articles were then read in evidence, the first article whereof being as follows:

81 "L. H. Langworthy, H. A. Sandford, Platt Smith, John J. Dyer, J. P. Farley, R. B. Mason, F. V. Goodrich, Robert C. Waples, M. Mobley, G. R. West, Asa How, F. S. Jessup, Edward Stinson, George W. Jones, Robert Waller, Robert Schuyler, and their associates and all such persons as shall hereafter become stockholders in the company hereby incorporated, hereby form themselves into a body corporate, under the name and style of the Dubuque and Pacific Railroad Company, for the purpose of constructing a railroad from some point in the city of Dubuque, thence westerly on the best route towards the Pacific Ocean."

The plaintiff's counsel offered in evidence certain resolutions of said Dubuque and Pacific Railroad Company, passed in July, 1856, and filed with the secretary of the State of Iowa; to the admissibility of which the defendant's counsel excepted, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision. Said resolution were therefore read in evidence, being as follows:

82 *Resolved*, That the Dubuque and Pacific Railroad Company hereby assent to and accept the provisions of an act enacted by the general assembly of the State of Iowa, and approved July , 1856, entitled "An act to accept of the grant to carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of lands to the State of Iowa in alternate sections, to aid in the construction of railroads in said State,' approved May 15, 1856."

Resolved, That the president and Secretary of the Dubuque and Pacific Railroad Company be, and they hereby are, required to affix their signatures to the above resolutions and have the same filed in the office of the secretary of the State of Iowa forthwith.

[SEAL.] J. P. FAILEY, *President.*

Attest: H. P. LEACH,
Secretary of D. and P. RR. Co.

83 The defendant's counsel offered in evidence a letter from the acting Commissioner of the General Land Office, dated August 20, 1856.

The plaintiff's counsel objected to the admissibility of said letter, but the court overruled the objection and received the evidence. The letter was then read in evidence, being as follows:

84 GENERAL LAND OFFICE, *August 20th*, 1856.

To Geo. W. McCleary, esq., secretary of the State of Iowa, at Iowa City:

SIR: I have the honor to acknowledge the receipt of your communication of the 12th instant, inclosing a certified copy of the act of the State legislature approved on the 14th July, 1856, to accept the grant and to carry into execution the trust conferred upon the State of Iowa by the act of Congress making the grant of lands for railroad purposes, approved May 15, 1856, which has been placed on the regular files in this office.

It is observed that the 6th section of the law directs that it shall be the duty of the governor, after affixing his official signature, to file such map in the department having control of the public land, in Washington, *such location being considered final only so far as to fix the limits and boundary within which lands may be selected.* The part which I have italicised appears to me to conflict directly with the act of Congress, which contemplates that the route shall be "definitely fixed," and it is proper that I should, through you, in this early stage of the business, call the attention of the State executive and the companies to the matter, and announce the opinion of this office, so as to prevent unnecessary delay. A route merely for fixing the limits
85 of the grant will not be acted upon here; it must be something real and fixed; the grant cannot be in one place and the actual route in another; although slight variations on the line, such as are unavoidable in the progress of the construction of such works would be admissible, any material changes of route would be considered as acting in bad faith with the United States, and cannot be tolerated, for such would be a clear violation of the law which purposes an indemnity to the United States for the lands granted away, by the enhanced value of the alternate sections remaining to the government near the route of the road; the route must, therefore, be first "definitely fixed," as required by the law of Congress, or no title vests.

In the above view it will be expected that the certificate of the governor on the maps returned to this department will set forth that such maps delineate the routes as "definitely fixed," that is, that they are final locations, before they can receive our action.

I am, respectfully, your obedient servant,

JOS. S. WILSON, *Acting Commissioner.*

86 The plaintiff's counsel offered in evidence a certificate of the Dubuque Railroad Company, dated September 27, 1856, and filed with the secretary of the State *of the State* of Iowa, September 30, 1856, to the admissibility of which the defendant's counsel objected. The court overruled the objection and received the evidence, and the defendants counsel excepted to such decision. The said certificate was then read in evidence, being as follows:

87 OFFICE OF THE DUBUQUE AND PACIFIC RAILROAD CO.,
Dubuque, September 27th, 1856.

It is hereby certified that in pursuance of the act of the legislative assembly of the State of Iowa, approved July 14th, 1856, entitled "An act to accept of and carry into effect the trust conferred on the State of Iowa by an act of Congress entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May 15, 1856," this map shows the location of the line and route of the Dubuque and Pacific railroad, from the city of Dubuque to a point on the Missouri River, at Sioux City, with a branch from the mouth of the Tete des Morts to the nearest point on said road, as definitely fixed, in compliance with said act of Congress, and in pursuance of a resolution of the board of directors of said railroad company passed on the 26th day of May, 1856, directing B. B. Provost, chief engineer of said road, to locate and definitely fix said route; and that so much of the field-work as is dated in said map since the 26th day of May last was done in pursuanceof said resolution; that so much of the field-work as is dated on said map
88 anterior to the 26th day of May last was located at the time indicated by said dates, in pursuance of several resolutions of said board directing said engineer to locate the same.

In testimony whereof, the Dubuque and Pacific Railroad Company has hereunto attached its corporate seal and caused the same to be [L. S.] signed by its president and engineer, at Dubuque, this 27th day September, A. D. 1856.

J. P. FAILEY, *President.*
B. B. PROVOST, *Engineer.*

Filed Sept. 30th, 1856.

GEO. W. McCLEARY,
Secretary of State.

Attest: H. P. LEACH,
Sec'y of D. & P. RR. Co.

89 The plaintiff's counsel gave in evidence that the land mentioned in the declaration in this suit lies within six miles of the line or route of the road shown on the map or plot thereof mentioned in said certificate, and that said route or line shown on said map or plot is on the general route of the road designated by the act of Congress of May 15, 1856; to the admissibility of which facts the defendant's, in time, counsel objected, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision.

The defendant's counsel gave evidence that at the time of the passing of said Iowa statute of July 14, 1856, and on the filing of said certificate on the 30 September, 1856, no portion of the railroad of the Dubuque and Pacific Railroad Company had been actually constructed, and no part of said road was completed until May 11th, 1857, when the first thirty miles, extending westerly from Dubuque, were opened for business, and during the year 1857 eight miles more were completed, and said Dubuque and Pacific Railroad Company did not have 75 miles of said road completed and equiped within three years from the first day of December, 1856, or thirty miles in addition in each year thereafter as required by the aforesaid act of the general assembly of Iowa, passed 14th July, 1856; that said railroad
90 had not been completed to any point nearer than one hundred and ten miles distant from said land at the time of the passage of the joint resolution of Congress on 2d March, 1861, and it had not been completed to any point nearer than ninety miles distant from said land at the time of the passage of the act of Congress, 12th July, 1862; that the general assembly of the State of Iowa, on the 7th March, 1860, passed an act as follows:

"An act extending the time for completion of 75 miles of road by the Dubuque and Pacific Railroad Company.

"Whereas it has been represented that the Dubuque and Pacific Railroad Company did not complete seventy-five continuous miles of said road by the first day of December last as required by the 8th section of the act approved fourteenth July, A. D. 1856, comonly called the land grant act, but have since completed the same: Therefore—

"SEC. 1. *Be it enacted by the general assembly of the State of Iowa*, That said subsequent completion of said seventy-five miles shall be deemed a substantial compliance with the provisions of said section by said company."

That on the 26 of March, 1860, the said general assembly passed another act, as follows:

91 "An act entitled an act declaratory of the meaning of an act for extending the time of completion of seventy-five miles of road by the Dubuque and Pacific Railroad Company, approved 7th March, 1860.

"Whereas the first section of the said act above recited reads as follows: Be it enacted by the general assembly of the State of Iowa, that said subsequent completion of said seventy-five miles shall be deemed a substantial

compliance with the provisions of said section by said company: Now, therefore—

"SECTION 1. *Be it enacted by the general assembly of the State of Iowa,* That said first section shall be considered and is hereby declared to mean that said completion of said seventy-five miles by said company shall be deemed to be a substantial compliance by said company with that portion of said 8th section which required seventy-five miles of said road to be finished by the first day of December last."

That the Secretary of Interior has certified and approved to the State of Iowa, under the act of May 15, 1856, in all 2,540,024 64-100 acres of which quantity 1,147,481 7-100 acres have been for and on account of the road mentioned in said act of Congress, from the city of Dubuque to a point on the Missouri River near Sioux City; and that the State of Iowa has not conveyed to said Dubuque and Pacific Railroad Company the lands men-
92 tioned in the declaration in this suit, or any of the lands so certified and approved to the State, under the act of 8th August, 1846, by any deed or patent, nor by any other means, unless said act of the general assembly of 14th July, 1856, should be deemed a conveyance thereof, and it has not in any manner transferred or conveyed, or attempted to transfer or convey said lands or any of them to said Dubuque and Pacific Railroad Company, or to any other part whatever, except to the Des Moines Navigation and Railroad Company, unless it be by said act of 14th July, 1856. To the admissibility of which several facts the plaintiff's counsel objected, but the court overruled the objection, admitted the evidence.

The plaintiff's counsel gave in evidence an act of the general assembly of the State of Iowa, passed January 28th, 1857, entitled as follows:

An act supplementary to an act entitled "An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled an act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856;" which said act of the legislature of Iowa was approved July 14th, 1856.

The defendant's counsel objected to the admissibility of said act, but the court overruled the objection and received the evidence, and said act was read in evidence, and the defendant's counsel excepted to such decision.

93 The plaintiff's counsel offered in evidence a certain mortgage, executed March 14th, 1857, by said Dubuque and Pacific Railroad Company to Abram S. Hewit and others, trustees, to secure the payment of $12,000,000 of bonds, which said company proposed to issue, and a deed of trust executed by said company June 9, 1859, to said trustees, confirming the grant made by said mortgage. The defendant's counsel objected to the admissibility of said mortgage and said deed, but the court overruled the objections and received them as evidence, and the defendant's counsel excepted to such decision. The said mortgage and deed were then read in evidence, the description of the premises in both being as follows:

"Also all right, title, interest, claim, or demand which said party of the first part now has or hereafter shall acquire, in or to all public lands of the United States, granted by act of Congress, approved 15th May, 1856, to the State of Iowa, and by the general assembly of said State of Iowa, by act approved July, 14th, 1856, granted to said Dubuque and Pacific Railroad Company, the party of the first part, subject, however, to the terms and conditions of the said acts of Congress and of the general assembly of the State of Iowa, with all the estate, right, title, and interest, property, possession, claim, or demand whatever, at law or in equity, of the said parties of the first part, in and to the same and each
94 and every part or parcel thereof, excepting, saving, and reserving

to the party of the first part all lands now owned or hereafter to be acquired by them, which may not be included in the said grant of public land from the United States, and may not be necessary for the uses and purposes of said railroad, and the depots and right of way thereof." And the plaintiff's counsel also read in evidence from said deed of trust the following passages, viz:

"This indenture is made for the further purpose of insuring to the party of the second part, not only all the title that said railroad company now has, but all the title which may hereafter be acquired, or which may be perfected or certified to said company, and said party of the first part hereby covenants and agrees to forever warrant and defend the title of said lands to the parties of the second part, their successors and assigns, against the lawful claims and demands of all persons whomsoever; also that the said lands are free from all incumbrances done or suffered by the party of the first part, except the mortgage before recited, executed to the party of the second part on the 14th day of March last, for the purpose of securing the indentical construction bonds herein mentioned, that said party of the first part now has all the title and right which was granted by Congress
95 to the State of Iowa, and by said State to the party of the first part.

"And said party of the first part further covenants and represents that said party has full and ample power and lawful authority, according to legal usage in the State of Iowa and the United States, to make, execute, and deliver this deed and said mortgage, heretofore executed on the 14th day of March last, for the purpose of securing said construction bonds, and that, according to said laws and usage, all subsequent rights which may be perfected to said lands will enure by estoppel to the sole use and benefit of the party of the second part; that this right and lawful authority exist by express legislation, as well as by usage and legal construction, as may be seen by reference to the several acts of the general assembly of the State of Iowa in this respect made and provided.

"And said party of the first part further covenants and represents that all the laws, usages, and acts of the general assembly made and provided, or bearing any relation to this subject shall be considered as part and parcel of this contract and deed, the same as though such laws and usages were herein set forth at large. And further, that it is a well settle principal of law in the United States of America, and the State of Iowa, that such laws and usages do enter into and become a part of the contract, without
96 reciting or referring to the same; and that no subsequent legislature can pass any act that will abrogate, repeal, or impair the rights of the party of second part."

The plaintiffs gave in evidence that the Dubuque and Pacific Railroad Company made default in the conditions of said mortgage, and the same was foreclosed, and upon foreclosure sale all the rights which passed by said mortgage were before March 2, 1861, sold to and purchased by the Dubuque and Sioux City Railroad Company, a corporation organized under the laws of Iowa. To the admissibility of which facts the defendants in time objected, but the court overruled the objection and received the evidence, and the defendants' counsel excepted to such decision.

The plaintiff's counsel offered in evidence the articles of incorporation of said last-mentioned railroad company, as filed in the office of the secretary of State of Iowa, August 13, 1860. The defendant objected to the admissibility thereof, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision. The said articles were read in evidence, the first article thereof being as follows:

97 ARTICLE I. E. F. Bishop, Morris K. Jessup, Harman Gelpcke, John Lord, Platt Smith, Frederick Schuchardt, Thomas E. Walker, C. H. Booth, J. P. Farley, Richard Benson, W. W. Hamilton, H. L. Stout, Edward Stimson, Stephen Hemstead, Roswell B. Mason, William G. Stewart, Wilson E. Hunt, Governeur Morris, Lucius P. Starr, and John Kennedy, and their associates, and all such person as shall hereafter become the stockholders in the company hereby incorporated, form themselves into a body corporate, under the name and style of the Dubuque and Sioux City Railroad Company, for the purpose of acquiring all of the rights, privileges, property, and franchises of the Dubuque and Pacific Railroad Company, and to complete and operate said road.

The plaintiff also gave in evidence that the said Dubuque and Sioux City Railroad Company claimed to have acquired by said mortgage, foreclosure, and sale, a title to all the lands mentioned in the act of Congress of May 15, 1856, in connection with the construction of a railroad "from the city of Dubuque to a point on the Missouri River near Sioux City," including every alternate section, designated by odd numbers, lying, within six miles of the line or road *of the line or road* of the Dubuque and Pacific railroad as located, and including the lands described in the declaration in this suit. To the admissibility of which facts the defendant's counsel in
98 time objected, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision.

The plaintiff's counsel gave in evidence that the said company last named had conveyed to other parties portions of said lands, including the lands described in the declaration in this suit. One of the deeds given on such conveyance being as follows.

To the admissibilty of which facts and said deed the defendant's counsel in time objected, but the court overruled the objection and received the evidence, and the defendant's counsel excepted to such decision.

99 Copy of deed from Dubuque and Sioux City Railroad Company to Fritz Gelpke, Edward Stimpson, John Lord, and Schuckhardt and Gephardt, in Book D, Webster County (Iowa) Records, page 695, filed for record June 22d, 1861.

Know all men by these presents that the Dubuque and Sioux City Railroad Company, of the State of Iowa, for and in consideration of the sum of twenty thousand dollars to them in hand paid by Fritz Gelpke, and the further sum of ten thousand dollars paid by Edward Stimpson, and the further sum of ten thousand dollars paid by John Lord, and the further sum of three thousand five hundred dollars paid by Schuckhart and Gephart, the receipt of which several sums of money is hereby acknowledged, doth hereby grant, bargain, and sell, alien, enfeoff, and convey unto the said Edward Stimpson, his heirs and assigns forever, the lands mentioned and described as follows:

Part of.	Sect'n.	Town.	Range.	Acres.
All	1	88	28	790.40
All	3	88	28	719.04
All	5	88	28	692.31
NE. ¼ and E. ½	7	88	28	240
All	9	88	28	640
All except lot 7	7	89	28	541.43
E. ½ and NW. ¼	9	89	28	480
All	11	89	28	640

Part of.	Sect'n.	Town.	Range.	Acres.
100 W. ½ NE. ¼, W. ½ W. ½ SE. ¼, and SE. ¼ SE. ¼	13	89	28	520
All	15	89	28	640
SE. ¼	17	89	28	160
All	5	88	29	733.08
All	7	88	29	612.48
All	1	89	29	601.90
All	3	89	29	627.90
All	5	89	29	611.26
E. ½	7	89	29	320
All	9	89	29	1,280
All	11	89	29	
NE. ¼	13	89	29	640
W. ½ and SE. ¼	15	89	29	
S. Ward, E. ½	21	89	28	480
All	23	89	28	1,920
All	25	89	28	
All	27	89	28	
All	31	89	28	657.34
All	33	89	28	1,280
All	35	89	28	
NE. ¼ NE. ¼	1	88	29	61.61
Lots 1, 7, and 8	1	88	29	94.97
SE., SE., W. ¼, SE., and W. ½ SW.	1	88	29	200
All	3	88	29	727.92
All	17	89	29	640
NE. of NE	19	89	29	40
All	21	89	29	1,280
All	23	89	29	
SE. ¼ and W. ½	25	89	29	480
All	27	89	29	640
E. ½ and NW., E. ½ SW	29	89	29	560
All	33	89	29	1,280
All	35	89	29	
				21,750.95

Reserving, however, to the said company the right of way for their road across said lands, with full and free power to locate and construct the same. To have and to hold the above granted premises to the said Edward Stimpson, his heirs and assigns, to his and their use and behoof, and to the use and behoof of the said Fritz Gelpke, John Lord, and Schuckhart and Gephart, and their heirs and assigns forever, in the proportion in which they have paid the purchase price of said lands above mentioned.

Witness the hands of Herman Gelpke, president, and James McKinlay, secretary of the Dubuque and Sioux City Railroad Company, and
101 the corporate seal of said company hereto affixed this eleventh day of February, A. D. 1861. And the said company doth hereby covenant to warrant and defend the said premises unto the said Edward Stimp-

son, and to his heirs and assigns forever, against the lawful claims of all persons whomsoever.

[L. S.] HERMAN GELPKE, *President.*
JAMES McKINLEY, *Secretary.*

Certificate of acknowledgment before—

DAVID A. McKINLAY,
Notary Public, Dubuque.

102 The defendant's counsel also gave in evidence that at the date of the conveyance last above contained, namely, February 11, 1861, no portion of the railroad from Dubuque to the Missouri River, near Sioux City, mentioned in the act of Congress of May 15, 1856, had been completed to any point within one hundred and ten miles of any part of the lands mentioned in the deed last above given in the declaration in this suit. To the admissibility of which facts the plaintiff's counsel objected, but the court overruled the objection, and received the evidence.

The foregoing evidence having put in, both parties rested.

The defendants requested the court to charge and instruct the jury that the defendants were entitled to a verdict, but the court refused so to charge and instruct, and the defendant's counsel excepted to such refusal

The plaintiff's counsel requested the court to charge and instruct the jury that the plaintiffs were entitled to their verdict, and to damages to the amount of the consideration money mentioned in the declaration, with interest from the date of the deed there mentioned.

The defendant's counsel, among other things, requested the court to charge the jury—

First. That upon all the evidence before them the lands in question,
103 before the passage of the act of May 15, 1856, had been reserved to the United States by competent authority, and were included in the reservation or exception contained in the first section of said act.

Second. That the act of May 15, 1856, was not an absolute grant conferring a title *in presenti* on the State.

Third. That no title could vest in the State under that act until the route of the railroad which it should aid was definitely fixed by permanent location, and total or partial construction of the railroad; and no such definite fixing of the route had taken place as to give operation to the grant by said act.

Fourth. That the Iowa statute of July, 1856, in respect of the location of the railroads therein mentioned, was not authorized by the act of Congress of May 15, 1856, nor in conformity thereto, and has no effect to vest, or aid in vesting, a title in the railroad companies.

Fifth. That no railroad having been completed to any point within twenty miles of the land mentioned in the declaration of this suit before the passage of the resolution of Congress, March 2, 1861, or the act of Congress of July 12, 1862, the title could not have passed to any railroad company before the passage of said resolution or said act.

104 Sixth. That the act of May 15, 1856, conferred on the State a naked power in trust which Congress might at any time revoke, and the same was revoked by the resolution of March 2, 1861, and act of July 12, 1862.

Seventh. That a removal of the reservation of the lands in question, subsequent to the passage of the act of May, 15, 1856, by the decision of the supreme court or by any other means, could not come to the grantees under that act, or confer any title to such reserved lands.

Eighth. If a title in said lands, vested in the State of Iowa by virtue of the act of May 15, 1856, then the subsequent conveyances by the State

vested the title in the defendants as purchasers, and the defendants are not bound to show an application by the State of the proceeds of the lands to the purposes mentioned in said act.

The court refused to charge as proposed in said several propositions otherwise than is contained below, and the defendants excepted to such refusal.

105 The court then delivered to the jury the following charge:

Gentlemen of the jury:

You will see that the conclusions to which I have come upon the questions raised by the evidence in this case dispose of all except one, and that relating to the damages only, which I will submit to you, I therefore charge you—

1. That no title to the lands in question passed to the Territory of Iowa by virtue of the act of Congress approved August 8, 1846, these lands lying above the Raccoon Fork of the Des Moines River. This point has been already settled by the Supreme Court of the United States in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 of How. Rep., 66.

2. That none of the acts of the executive officers of the United States which have been proved, nor all of them taken together, had any effect to extend the operation of the act of August 8, 1846, over these lands, nor in any manner to confer a title to them, either at law, or, strictly speaking, in equity, upon the Territory or State of Iowa, or upon these defendants. This result follows from the decision of the Supreme Court already cited.

106 3. That these acts of the executive officers of the United States, proved and relied on in this case, did not reserve to the United States these lands for the purpose of aiding in any other objects of internal improvements, or for any other purpose whatsoever, and therefore they are not drawn within the proviso of the act of May 15, 1856. These official acts were not prompted or guided by any such intention. Those of them which proceeded upon the idea that these lands were embraced in the grant of August 8, 1846, were mere errors arising out of a misconstruction of the terms of that grant. They were, no doubt, made in good faith, and for the purpose of formally fixing and defining rights supposed to have been already granted by Congress. But as these acts, according to the case, 23 of How., 66, exceeded the grant made by Congress they were void. These acts were intended as acts of transfer, and not acts of reservation. To now attribute to them the effect of having reserved these lands to the United States, that is, set them apart for the use of the government itself, would be reserving the natural consequences originally intended to flow from them; such a construction of these acts, I think, would be arbitrary, and neither warranted by any circumstances presented by the evidence or by the settled

107 rules of law. All these acts, therefore, left the lands in question in the same *status* in which they had always remained. That *status* was unchanged, not only in fact but in contemplation of law. The lands were neither sold, granted, nor reserved to the United States for any purpose, but remained in the great body of the public domain, subject to the control of Congress and to the operation of the laws in force regulating the disposition of the public lands.

4. If these views are correct, then the lands in question were embraced in the body of the act of May 15, 1856, and the title passed by that grant to the State of Iowa in trust. The State took the lands in trust, and by an express provision of the act they were to "be applied to no other purpose whatsoever" than that of aiding in the construction of certain railroads therein named. It is unnecessary to say that the defendants' enterprize is not one of those named in the act as those to which the application of the

lands granted is expressly restricted. Whether or not a title *in presenti* passed to the State on the passage of this act I do not deem it necessary now to determine; but I think it is quite certain that that act placed these
108 lands in such a position that they were not reached by the resolutions of Congress of March 2, 1861, and July 12, 1862, upon which the defendants rely. To conclude otherwise would be be to hold that these joint resolutions repeal *pro tanto* without any express provisions—by implication merely—the public act of May 15, 1856. A construction by which the repeal of a statute by implication is sought to be established is never favored, especially where private rights are concerned.

5. These views being legal conclusions drawn from facts conceded in the case, or established by uncontradicted evidence, cover the whole controversy, except the question of damages. It is my duty, therefore, to direct you to find a verdict for the plaintiff, and assess the damages which he has proved he has suffered from the failure of his title to these lands. The rule by which you will be guided will be the amount of the consideration paid, with interest from the day of payment to the present time, at the rate of six per cent. per annum.

109 The defendant's counsel excepted to that part of the charge concerning the effect of the act of August 8, 1846, contained in the second propositon or section of said charge; and also excepted to that part of the charge contained in the third proposition or section thereof, and also excepted to that part of the charge contained in the fourth proposition or section thereof, and also to that part of the charge contained in the fifth proposition or section thereof.

The court thereupon charged and instructed the jury to find a verdict for the plaintiff, to which charge and instructions the defendant's counsel excepted.

The jury found a verdict in favor of the plaintiff, and assessed his damages at $24, 254 90.

And because the said several exceptions do not appear by the record of the said trial, the said presiding judge, on the prayer of the defendants, has set to this bill of exceptions his seal, the third day of November, one thousand eight hundred and sixty-four.

WILLIAM D. SHIPMAN. [L. S.]

Filed Nov. 21, 1864.

110 Of the United States of America for the southern district of New York, in the second circuit.

CALVIN BURR, plaintiff,
vs.
THE DES MOINES NAVIGATION AND RAILROAD COMPANY, defendants.
} Bond for costs.

Know all men by these presents that we, Electus B. Litchfield and William Savage, are held and firmly bound unto the above-named plaintiff, in the sum of five hundred dollars, to be paid to the said plaintiff, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 19th day of November, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named defendants have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said writ of error and complaint good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

E. B. LITCHFIELD. [L. S.]
W. SAVAGE. [L. S.]

Sealed and delivered, and taken and acknowledged this 19 day of Nov., 1864, before me by Electus B. Litchfield and William Savage above named, to me known to be the persons who executed the foregoing bond.

JOHN G. FLOYD, JR.,
Notary Public, N. Y. City.

111 UNITED STATES OF AMERICA,
Southern district of New York, ss:

Electus B. Litchfield and William Savage, being duly sworn, depose and say, and each for himself says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

E. B. LITCHFIELD.
W. SAVAGE.

Sworn to this 19 day of Nov., A. D. 1864, before me.

JOHN G. FLOYD, JR.,
Notary Public in N. Y. City.

The foregoing bond and the sureties therein named are consented as sufficient.
Nov. 21, 1864.

F. W. GILBERT, *Pl'ff's Att'y.*

Approved Nov. 22, '64.

S. NELSON.

Filed this 22 day of Nov., 1864.

112 By the honorable one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to Calvin Burr:

Whereas the Des Moines Navigation and Railroad Company, plaintiff in error, lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between you, said Calvin Burr, defendant in error, as plaintiff, and said plaintiffs in error as defendants, a manifest error hath happened, to the great damage of the said the plaintiffs in error; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the fifth day of Dec'r next: You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said fifth day of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 22 day of Nov., in the year of our Lord

one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

S. NELSON.

113 Endorsed: U. S. Supreme Court. The Des Moines Navigation and Railroad Co., pl'ffs in error, *vs.* Calvin Burr, def't in error. Citation. Tracy & Olmsted, att'ys.

Due service of a copy of the within citation is hereby admitted this 18 day of Nov., 1864, at No. 18 William st., in the city of New York.

CALVIN BURR.

Filed Nov. 22, 1864.

Record filed December 10, 1864.

Supreme Court of the United States.

DECEMBER TERM, 1865.

No. 303.

SAMUEL G. WOLCOTT, PLAINTIFF IN ERROR,

vs.

DES MOINES NAVIGATION AND RAILROAD CO.,
DEFENDANTS IN ERROR.

ALSO,

No. 221.

THE DES MOINES NAVIGATION & RAILROAD CO.,
PLAINTIFF IN ERROR,

vs.

CALVIN BURR, DEFENDANT IN ERROR.

ARGUMENT OF PLATT SMITH, WHO INTERVENES IN BEHALF OF THE DUBUQUE AND SIOUX CITY RAILROAD COMPANY.

Both of these cases come up from the Circuit Court of the United States from the Southern District of New York. They are both upon the same identical issues, and substantially upon the same state of facts. They are both suits brought against the Des Moines Navigation and Railroad Company, to recover damages for an alleged failure of title to certain lands in Iowa, conveyed by defendants below, to the plaintiffs below, by warrantee deed. The plaintiffs below are citizens of the State of New York, and the defendant below is a citizen of the State of Iowa.

The lands in dispute lie within five miles of the Des Moines River, and above the mouth of the Raccoon fork, and in the alternate odd numbered sections; and they also lie within the six and fifteen mile limit of the Dubuque and Sioux City Railroad Company, and are included in the Act of Congress granting lands to Iowa, passed May 15th, 1856.

The Des Moines Navigation and Railroad Company claim title to these lands under an Act of Congress passed August 8th, 1846, granting lands to Iowa to aid in the improvement of the navigation of the Des Moines River, and under grants and deeds from the State of Iowa to said company, and also under a joint resolution of Congress, passed March 2, 1861, and under an Act of Congress, passed July 12th, 1862.

The Dubuque and Sioux City Railroad Company claim title to the same lands under an act of Congress passed May 15th, 1856, granting lands to Iowa to aid in the construction of certain railroads, and grants from the State of Iowa to the Dubuque and Pacific Railroad Company, and conveyances from said company to the Dubuque and Sioux City Railroad Company.

Three questions are raised by the records in these cases:

First—Did the act of Congress passed August 8th, 1846, grant the lands in dispute to the State (then Territory) of Iowa for the purposes specified in the act?

Second—Did the act of Congress of May 15th, 1856, grant the lands in dispute to the State of Iowa for the purposes specified in said act, and did the act vest the title to said lands in dispute in the State of Iowa; or were the lands in dispute reserved to the United States, so that said act of May 15, 1856, did not operate to vest them in the State of Iowa?

Third—Did the joint resolution of Congress passed March 2d, 1861, or the act of July 12, 1862, pass the title to the lands in dispute to the State of Iowa, and through said State to the Des Moines Navigation and Railroad Company?

The first question was brought directly before this Court in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, and is reported in 23d Howard, 66.

The Court, in an elaborate opinion, held that the act of August 8th, 1846, did not grant to the State of Iowa any lands above the mouth of the Raccoon fork, and that the Des Moines Navigation and Railroad Company, under whom Litchfield claimed title, had no title to the lands in dispute.

That decision must be a finality, as far as the construction of that act is concerned. Yet the said Des Moines Navigation and Railroad Company have been making continued attempts to overturn that decision. The defendant Litchfield was the President of said company about the time of that decision. See record, page 5, in the Samuel G. Wolcott case, now on hearing. The judgment entered in the Circuit Court of Iowa, upon the mandate of this Court, was set aside, and it required the peremptory mandamus of this Court to have that judgment stand as the judgment of said Circuit Court.

Dubuque & Pacific Railroad Co., *ex parte*, 1 Wallace, 69.

A suit was then brought in the Circuit Court for Iowa by Calvin Burr, against said Des Moines Navigation and Railroad Co., involving the title to a portion of the same lands as in the present suit, and the case submitted upon an agreed statement of the evidence. This case is recorded in 1st Wallace, 99. The Dubuque and Sioux City Railroad Company intervened in that case, in this Court, and the case was dismissed.

It is clearly for the interest of the plaintiffs below, in these cases, to have the defendant obtain judgment on the question of title, for then they would hold their lands under their deeds. It is also to the interest of the defendant below to succeed, for if it can now succeed in procuring from this Court an opinion that its title to the lands in dispute is valid, it will give it some one hundred thousand acres of land now held by the Dubuque and Sioux City Railroad Company. This very readily accounts for the reason that the defendant

The lands in dispute lie within five miles of the Des Moines River, and above the mouth of the Raccoon fork, and in the alternate odd numbered sections; and they also lie within the six and fifteen mile limit of the Dubuque and Sioux City Railroad Company, and are included in the Act of Congress granting lands to Iowa, passed May 15th, 1856.

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Third—Did the joint resolution of Congress passed March 2d, 1861, or the act of July 12, 1862, pass the title to the lands in dispute to the State of Iowa, and through said State to the Des Moines Navigation and Railroad Company?

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That decision must be a finality, as far as the construction of that act is concerned. Yet the said Des Moines Navigation and Railroad Company have been making continued attempts to overturn that decision. The defendant Litchfield was the President of said company about the time of that decision. See record, page 5, in the Samuel G. Wolcott case, now on hearing. The judgment entered in the Circuit Court of Iowa, upon the mandate of this Court, was set aside, and it required the peremptory mandamus of this Court to have that judgment stand as the judgment of said Circuit Court.

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It is clearly for the interest of the plaintiffs below, in these cases, to have the defendant obtain judgment on the question of title, for then they would hold their lands under their deeds. It is also to the interest of the defendant below to succeed, for if it can now succeed in procuring from this Court an opinion that its title to the lands in dispute is valid, it will give it some one hundred thousand acres of land now held by the Dubuque and Sioux City Railroad Company. This very readily accounts for the reason that the defendant

in the Court below should voluntarily go to the State of New York and enter an appearance to suits there, where it might be out of the way of the interference of the Dubuque and Sioux City Railroad Company.

The records in these cases show that there is no real contest between the parties to the suit, but that the real litigant against both parties is the Dubuque and Sioux City Railroad Company. The other Railroad Companies interested in the lands granted in the act of May, 1856, which cross the Des Moines above the Raccoon fork are also interested in the questions involved.

The second question can only be answered in the affirmative. The act itself vested the title to the lands therein described in the State of Iowa. Its language is: "*That there be, and is hereby, granted to the State of Iowa*, for the purpose" &c. This is a present grant. The particular lands granted are made certain by the location of the line of the road, and all the estate of the United States, passed, by the act itself, to the State of Iowa. We refer to a few of the authorities on this point, as it seems so well settled as to be beyond dispute.

United States *vs.* Brockes, 10 Howard, 442.
Lassieur *vs.* Price, 12 Howard, 59.
Dubuque & Pacific Railroad Company *vs.* Litchfield, 23 Howard, 66.

In this last case, the Court, speaking of the act of August 8, 1846, where the granting clause is in the same language as the act of May 15, 1856, uses the following language: "The act of Congress was a direct grant to Iowa, in fee, of the undivided moiety of the whole tract on each side of the river from the Raccoon fork to the Missouri line. Congress had the undoubted power to make the grant and vest the fee." The record in case of S. G. Wolcott, page 46, shows that said road was located on the 27th day of September, 1856, and the lands in dispute lie within the six-mile limit of the line of said road, and are the alternate odd-numbered sec-

tions. On the 14th day of July, 1856, the General Assembly of Iowa passed an act granting all the lands included in the act of May 15, 1856, to aid in the construction of a railroad from Dubuque to a point on the Missouri river at or near Sioux City, to the Dubuque and Pacific Railroad Company. The granting part is in the following language :—" are hereby disposed of, granted, and conferred, to and upon, the Dubuque and Pacific Railroad Company" &c. This is a grant *in presenti*, and vested the title to the lands in said Company. Upon the location of the line of said road, the title in the particular lands vested, and the United States had no remaining interest in them.

On the 9th day of July, 1857, said company conveyed the lands in dispute, by deed of trust, to certain parties to secure bonds to be issued for the construction of the road, and on the day of November, 1863, said Dubuque and Sioux City Railroad Company (which had become invested with the right and title of the Dubuque and Pacific Railroad Company in said lands) conveyed the same to George J. Forrest and others.

It is now claimed that the last proviso to the first section of the act of May 15, 1856, excepted the lands claimed by the Des Moines Navigation and Railroad Company from the operation of this grant. That proviso is as follows : "and provided further that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any other purpose whatsoever, be, and the same are, hereby reserved from the operation of this act", &c. It is not claimed that any act of Congress had reserved the lands in dispute to the United States, unless the decision in the case of the Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 How., is erroneous, and is to be overruled. But it is claimed that these lands were reserved to the United States by certain executive officers of the Government, and that the joint resolution of March 2d, 1861, and the act of Congress of July 12th, 1862,

vested these lands in the State of Iowa, and, through it, in said Des Moines Navigation and Railroad Company. The above proviso requires that the reservation be to *some legal purpose*, and *by competent authority*. The only purpose claimed for such reservation was to aid in the improvement of the Des Moines River. But this Court held in, the above case in 23 Howard, that the lands in dispute were not reserved, and that no right in or to them passed by the act of August 8th, 1846. No reservation had been made by any competent authority? The evidence set out in the record shows that prior to the act of May 15, 1856, the proper executive officers of the land department of the United Stetes had construed the act of August 8, 1846, as a grant extending above the mouth of the Raccoon fork, and as including the lands in dispute, that the lands in dispute had been selected as within said grant, and that such selections had been approved by the proper executive officers of the United States. If these officers had authority to make a reservation within the aforesaid proviso, and did make such reservation, then the Dubuque and Sioux City Railroad Company has never had any title to the said lands. The absolute power over, and right of disposition of, the public lands of the United States is in Congress. No such right exists in any of the officers of the Government, unless specially conferred for some particular purpose by act of Congress. The only authority conferred by act of Congress is the act of August 8th, 1846, and this Court has held that no right of reservation was conferred upon such officers by that act. In the case in 23 Howard, above quoted, the Court says: "No authority was conferred upon the executive officers administering the public lands to do more than make partition between the tenants in common, Iowa and the United States, in the manner prescribed by Congress. The premises in dispute lie sixty miles beyond the limits of the trust granted. It was, therefore, impossible to make partition under this grant, of lands lying outside of its boundaries, and *all attempts to do so were merely nugatory*." These officers never claimed or professed to reserve these lands to the

United States by any right in themselves to do so, but only for the purpose of carrying into effect the act of August 8, 1846. These officers have power to offer for sale, and to suspend from sale, the public lands of the United States, as prescribed by law, but no authority is conferred upon them to reserve the public lands for any particular uses. On the 1st of June, 1849, the officers of the Land Office at Iowa City were directed to *withhold from sale* the lands in dispute. See record in the Wolcott case, page 12. These executive officers withheld these lands from sale, not as a reservation, but temporarily, till the construction of the act could be judicially decided. See same record, pages 14 and 15, 26 and 27.

On the 10th day of May, 1856, just before the act of May 15, 1856, was passed, all the land officers in Iowa were directed to suspend from sale *all* the lands in the several land districts. If a simple withholding of lands from sale, or suspension of lands from sale, by the executive officers, is a reservation to the use of the United States for a particular purpose, then the State of Iowa acquired no title to any lands in Iowa, or it acquired the title to all the lands in said land office districts, for all the lands were reserved from sale.

We, therefore, insist that no reservation of the lands in dispute had been made by competent authority, and that the title to the lands vested in the State, and that no act of the executive officers, or even of Congress, could divest the State of Iowa of such title, after the acceptance of the grant by the State.

Third—We further claim that, under the last question, no title to the lands in dispute passed to the State of Iowa under the joint resolution of 1861, or the act of Congress of July 12th, 1862, for the reason that the United States had no title to grant. It had already divested itself of the title by the act of May 15th, 1856. No title could pass from the State of Iowa under the act of July, 1862, for the reason that a grant by a State is not a warrantee, and a subsequently acquired title does not inure to a grantee from a sovereign power.

"Grants made by a legislature are not warrantees; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee." Rice *vs.* Railroad Co., 1 Black, 374.

All the questions involved in these cases seem to have been fully settled by the prior adjudication of this Court, and we trust that the decision in these cases will end litigation in regard to the title to these lands.

PLATT SMITH,
For Intervenors.

BALLOU & WINALL, PRINTERS, DUBUQUE.